Received August 15, 2001

CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
/s/ JH Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MICHAEL MCNEILL
Plaintiff,

vs.

TOWN OF PARADISE VALLEY, et al.,
Defendants.

Several motions are pending before the court. The principal motion is Defendant Town of Paradise Valley's Motion for Judgment (doc. #133), one court heard oral argument August 13, 2001. Having considered the matter carefully, the court now rules on the summary judgment

motion. At this time the court also resolves Plaintiff's Cross-Motion (doc. #142), Defendant's Motion to Strike (doc. #145), and Plaintiff's Motion for reconsideration (doc. #131).

BACKGROUND

As the court has already issued two orders on dispositive motions, see Order of December 14, 19 (motion to dismiss) and Order of April 9, 2001 (motions for summary judgment), it presumes general familiarity with the facts of

this case. The issue arises out of a photo radar civil traffic citation issued to Plaintiff in August 1997. The sole remaining claim is Plaintiff's claim that his Fourth Amendment rights were violated by the issuance of the citation. Defendant and Plaintiff cross-moved for summary judgment on this claim previously. The court determined that an essential piece of evidence lacked necessary foundational support, however, and denied the motions. Thereafter, on the last day of the period for filing dispositive motions, May 14, 2001, Defendant filed another summary judgment motion as to this Fourth Amendment claim. It is this last motion that the court addresses here.

DISCUSSION

A. Summary Judgment

At the outset, the court clarifies how Plaintiff's "Cross Motion for Summary Judgment" will be considered. Plaintiff's brief was filed on July 19, 2001, well after the dispositive motion deadline, thus rendering it nonviable as a summary judgment motion. The question becomes whether to strike the cross-motion, as Defendant proposes, or to consider it as a response to Defendant's motion. The court finds that treating the cross-motion as a response is the better choice. Plaintiff had requested additional time to file a response to Defendant's motion, and the court allowed an extension until July 20, 2001. Order of June 27, 2001 (doc. #141). The timing of the cross-motion, and the fact that no other response was filed, suggests that Plaintiff intended the cross-motion to serve as a response. In addition, the arguments in the cross-motion may fairly be read to respond to Defendant's motion. The court finds the extreme measure of striking the cross-motion unwarranted, and proceeds to the motion.

In determining whether to grant summary judgment, the court will view the facts and inferences from

these facts in the light most favorable to the nonmoving party. Matsushita Elec. Co. v. Zenith Radio Corp., 475 U.S. 574, 577 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). A material fact is any factual dispute that might affect the outcome of the case under the governing substantive law. Id. At 248. A party opposing a motion for summary judgment cannot rest upon mere allegations or denials in the pleadings or papers, but instead must set forth demonstrating a genuine issue for trial. See e.g., California Architectural Build. Prods., Inc. v. Franciscan Ceramics, 818 F.2d 1466, 1468 (9th Cir. 1987). Only admissible, properly authenticated evidence may be considered on a Rule 56 motion. Canada v. Blain's Helicopters, 831 F.2d 920,925 (9th Cir. 1987).

Plaintiff's Fourth Amendment claim asserts that the Town did not have a sufficient basis to issue him a traffic citation for speeding. As described in previous orders, the photo radar system functions by taking pictures of the drivers and the license plates of speeding vehicles and issuing citations to the registered owner of those vehicles. Plaintiff's objection centers on the Town's inference that a vehicle's owner is the person likely to be driving it while speeding, or at least to know who the speeder is. The court has rejected Plaintiff's general squeamishness about the photo radar procedure, finding that the inference from vehicle registration records creates reasonable grounds for the citation. The court has required the Defendant to show that the citation was properly issued to Plaintiff, however.

In order to be valid, a citation must be either sworn or certified. A.R.S. § 28-1561. In moving for summaray judgment previously, the Defendant submitted a

certification by Officer Coppola. This certification aimed to connect the officer's photo radar monitoring activities with the issuance of Plaintiff's traffic citation, without demonstrating an adequate evidentiary foundataion, In the absence of a certification to support the citation, the court denied Defendant on the Fourth Amendment claim.

In moving for summary judgment again, Defendant attempts to remedy the problems with the certification. It submits and affidavit from Officer Coppola describing the photo radar deployment process. Coppola states that on August 19, 1997, he was trained and qualified to operate the Town's photo radar device. DSOF (doc. #134), Ex. A (Coppola Aff.) ¶ 3. He tested the device before and after operating it and ensured it was working properly. Id. ¶ 5. When the device detected a speeding vehicle, it took a picture of the driver and of the license plate. Id. ¶ 9. The computer system for the device then recorded the information regarding the speeding vehicle. Id. ¶ 10. Several vehicles were identified by the device as speeding that day. Afteng thdeployment, coppola obtained a print-oucles recorded speeding. Id. ¶ 11.[1] On August 19, 1997, Coppola executed a certification that he had reasonable grounds to believe that each of the vehicles listed on the print-out had been speeding. Id. ¶ 12. Once Coppola executed the certification, the certification and print-out was used to issue traffic citations. Id. ¶ 16. The print-out identified Plaintiff as the owner of one of the vehicles. Coppola identified the certification previously submitted by Defendant as thegnd1 i997. Id. ¶ 14.

Defendant contends that in light of Coppola's

---

[1] A redated version of the print-out is included in Defendant's Reply. At oral argument, Plaintiff submitted an exhibit that contained an unredacted copy of the print-out. The unredacted copy is under seal with the court

affidavit, and the fact that Plaintiff has not disputed that he owned the truck identified as speeding, there was reasonable grounds for the issuance of the traffic citation to Plaintiff. The court is inclined to agree in the absence of a persuasive rebuttal by Plaintiff.

Plaintiff responds with a series of objections Defendant's foundational evidence. He first argues that the affidavit is not admissable because it is not notaraized. Defendant correctly points out that notaraization is not necessary because the affidavit includes a statement recognizing that it is taken under penalty of perjury, pursuant to U.S.C. § 1746. To be doubly safe, Defendant also submitted a notarized affidavit in connection with its reply. The affidavit is admissible.

Plaintiff next identifies a discrepancy in the typefaces of the first two pages and the signature page of the affidavit. He argues that the affidavit is not trustworthy. In reply, Defendant explains that the affidavit was faxed to Coppola and Coppola faxed back only the signature page. The reply cfidavit from Coppola explaining his actions and stating that he read and ascribed to the entire affidavit. The mere fact of the varying typefaces is no ground for disqualifying the affidavit.

Plaintiff's third contention—that he has had no opportunity to "test the sufficiency" of the certification Coppola signed—is disproved by the facts. Plaintiff was given leave to depose Coppola, and although a date was set, Plaintiff canceled without rescheduling. Plaintiff's contentions on this score are waived.

Finally, the court has already considered and rejected Plaintiff's other arguments concerning the admissibility of the traffic citation.

More substantively, in the body of his response brief, Plaintiff argues that his Fourth Amendment claim turns on the court's construction of the Arizona statute

permitting certification in lieu of a sworn citation. Plaintiff points out that A.R.S. § 28-1561 requires unsworn traffic citations to "contain" certifications, but he fails to explain how this requirement was not met. The certification was clearly incorporated at line 9 of the citation This argument has no merit.

Plaintiff also contends that the Town's Code elides the state's certification requirement. Plaintiff reaches this conclusion by referring to the Code's that in the absence of probative contrary evidence, vehicle registration information can identify the person responsible for a traffic violation, The court finds Plaintiff's quarrel with the Town Code similarly fruitless. The certification requirement is not eviscerated by reliance on vehicle registration information.[2]

At oral argument, Plaintiff asked the court to take judicial notice that corporations cannot drive cars. He employs this fact to suggest that the certifications of Officer Coppola are not trustworthy, because Coppola's certification includes cars belonging to corporations. Plaintiff argues that no police officer could reasonably certify that corporations were drivng these speeding vehicles. The court will judicially note that while

Corporations cannot drive and employees can. In any event this line of argument is not relevant, because McNeill himself is not a corporation and it is undisputed that he was driving the speeding vehicle. The court rejects Plaintiff's attempt to impugn Copploa's testimony.

The court has considered Plaintiff's remaining

---

[2] This section of the response contains the following bit of contentious rhetoric: "Plaintiff recomnends that the town's agents catch the next boat to Buenos Aries (sic) for the purpose of living out their lives in the company of the other surviving Nazis left in this world, and take their lawyers with them!" Response at 8. Not only is the suggestion of taking a boat from Phoenix a stretch, but the posturing is decidedly unhelpful..

contentions—such as his belief that the traffic citation effected an unlawful search of his mind and person by requiring him to appear in court—and finds them without merit. Defendant's motion for summary judgment shall be Granted.

B. Reconsideration

On April 17, 2001 Plaintiff filed a motion for reconsideration of the court's decision of April 6, 2001. A district court may reconsider its grant of summary judgment under either Federal Rule of Civil Procedure 59 (e) (motion to alter or amend a judgment) or Rule 60(B (relief from judgment). School Dist. No. 1J Multnomah County, v. ACandS, Inc. ("Multnomah County"), 5 F.3d 1255, 1262 (9th Cir. 1993). Plaintiff does not indicate the basis for his motion.

1. Rule 59 (e)

Reconsideration RULE59 (e) is appropriate if the district court (1) isd with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law. Multnomah County, 5 F.3d at 1263. A reconsideration motion should not merely present arguments previously raised. See Backlund v. Barnhart, 778 F.2d 1386, 1388 (9th Cir. 1985.

In moving for reconsideration, Plaintiff argues that the court erred in finding no violation of his Eighth, Ninth, Thirteenth and Fourteenth Amendment equal protection rights. The court also found no violation of Plaintiff's asserted right to be free from undue government interference, which Plaintiff anchored to the Fifth Amendment. While the court agrees with Plaintiff's general proposition that constitutional rights are important, Plaintiff still fails to show that any of his constitutional rights were violated.

a. *Fourteenth Amendment*

First, Plaintiff repeats his argument that photo radar is unconstitutional because vehicle ownership does not constitute sufficient evidence of the identity of the speeder. He argues that Defendant's inference of liability based on vehicle ownership records violates the due process guarantees of the Fourteenth Amendment. Due process was not the claim previously before the court, however. Plaintiff alleged that his equal protection rights were denied by photo radar, not his due process rights. See Order at 16. The court shall not consider a due process claim for the first time on a motion to reconsider.

b. *Fifth Amendment*

Plaintiff also argues that the use of photo radar to link truck violates his Fifth Amendment rights. To determine what putative Fifth Amendment rights Plaintiff invokes, the court refers to Plaintiff's cross-motion for summary judgment and his Amended Complaint filed June 23, 1999. The complaint alleges that Plaintiff's Fifth Amendment rights were violated when he was issued an unsworn traffic citation, Am. Compl. (doc. #28) ¶ 17, 19; that the practice of issuing citations based on vehicle ownership violates the Fifth Amendment generally, id. ¶ 18; and that he has a general right to be left alone pursuant to a great number of amendments, including the Fifth, id. ¶ 26. In his cross-motion for summary judgment, filed January 19, 2001, Plaintiff listed two ideas under his Fifth Amendment claims. First, he argued this "to be left alone by government" had been violated, and second, he argued a violation in connection with incidents the court has previously dismissed from consideration.

In its prior order, the court perceived the complaint and cross-motion as roughly coextensive. As to the second of the two arguments made in the cross-motion, the court

did not discuss any of the decided issues that Plaintiff was attempting to resuscitate. As to the former argument, the court attempted to identify a "right to be left alone" that would encompass freedom from traffic surveillance in other constitutional provisions without success. See Order at 19-20. The court did not, however, unequivocally state that no such Fifth amendment right exists.

In his pleadings and briefs, Plaintiff proceeds on the assumption that such a right exists. Such an assumption is not warranted. At this point, in order to prevail on his motion for reconsideration, Plaintiff has to show (1) that the fifth amendment right he proposes has been or should be recognized, and (2) that the court erred in either (a) failing to identify a material issue of fact as to whether Defendant's actions violated that right or (b) failing to recognize that Plaintiff was entitled to judgment as a matter of law. He has not done so. Surely Plaintiff is convinced that the facts show a violation, but he has not demonstrated the legal basis of his claimed right. There must be some good reason why Plaintiff;s claim of privacy should succeed against society's interest in monitoring the roads to ensure safe conditions. Society has a legitimate interest in containing the negative results of others' risk-taking. See Lawrence H. Tribe, American Constitutional Law ¨ 15-12 (2d ed. 1988) (discussing the constitutionality of helmet and seat belt laws). But Plaintiff does not even describe the interest he believes is protected, or explain how his expectations were violated. How Plaintiff would fill in these gaps is not obvious. After all, the roads are public spaces, maintained with taxpayer funds, and Plaintiff's mode of driving is public conduct. If there is a right not to be accountable for public conduct, Plaintiff does not explore it. To the extent that he suggests that he should be responsible for his conduct only if he speeds when consciously aware of government monitors, the court

does not foreclose this as a constitutional possibility, but it is not persuaded by Plaintiff's presentation of the argument. While the court is conscious of Plaintiff's status as a pro se litigant, the court will not undertake to do his work for him on a motion for reconsideration. [3]

Moreover, on closer inspection of the complaint, the court perceives Plaintiff's "right to be left alone" argument as an argument that heshould not have been required to appear in Paradise Valley to defend the traffic citation. If the court's understanding of Plaintiff's argument is correct, there is no fifth amendment claim. As explained in the april order, the traffic citation did not compel Plaintiff to appear. The court rejected Plaintiff's characterization of the onerousness of Defendant's traffic citation procedures. Contrary to Plaintiff's asertions that he was unjustly required to go to great expense to "defend himself against corrupt public officials," Plaintiff had four options when he received the citation and was not obligated to drive from South Carolina to Phoenix. Plaintiff's choice to make the drive cannot form the basis for a constitutional claim, since the burdensome driving was not compulsory. Thus, it appears that even if there were a pertinent Fifth Amendment right, Plaintiff did not allege facts involking it, and his claim would have to be dismissed. [4] Ultimately, no matter how the Fifth Amendment claim is construed, Plaintiff does no more than rehash the argument he presented the court before. This is not a proper basis for a motion for reconsideration pursuant to rule 58(e), and the motion must fail.

2. Rule 60(b)

If Plaintiff's motion to reconsider were deemed a

---

[3] The court does not take a position whether a privacy right to be free from municipal interference can be grounded in the Fifth Amendment, as opposed to the fourteenth

rule 60(b) motion, relief would still be unavailable. Rule 60 (b) provides for reconsideration only upon a showing of (1) mistake, surprise, or excusable neglectl (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) extraordinary circumstances which would justify relief. Multnomah County, 5 F. 3d at 1263. "A party seeking reconsideration must show more than a disagreement with the Court's decision, and recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." United States v. Westlands Water Dist., 134 F. Supp. 2d 1111, 1131 (E.D. Cal.. 2001 (internal quotations omitted). Plaintiff's motion does not meet any of the six prongs. Therefore, the motion for reconsideration is denied.

THEREFORE IT IS ORDERED, redesignating Plaintiff's Cross Motion for Summary Judgment (doc. #142) as a Response to Defendant's Motion for Summary Judgment.

IT IS FURTHER ORDERED, denying Defendant's Motion to Strike (doc> #145).

IT IS FURTHER ORDERED, granting Defendant's Motion for Summary Judgment (doc. #133).

IT IS FURTHER ORDERED, denying Plaintiff's Motion for Reconsideration (doc. #131).

IT IS FURTHER ORDERED, denying all other pending motions as moot. The clerk is directed to enter Judgment for Defendants and to terminate the case.

DATED this 14 day of August, 2001/

/s/ Robert C. Broomfield
Senior United States District Judge

Copies to counsel and parties of record

APPENDIX IV

Filed
AUGUST 15, 2001
CLERK U.S. DISTRICT COURT
DISTRICT OF ARIZONA
/s/ JH , Deputy

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

JUDGMENT IN A CIVIL CASE

Michael McNeill,)
)
Plaintiff(s),)
v.)
)
Town of Paradise Valley,)
et al.)
Defendant(s).)

___ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the

jury has rendered its verdict.

XX **Decision by Court.** This action came for consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED per the Court's order of August 15, 2001, granting Defendants' motion for summary judgment, this case is closed. Plaintiff to take nothing.

August 15, 2001
Date

RICHARD H. WEARE
District court
Executive/Clerk
/s/ J Hyatt
(By) Deputy Clerk

Cc: (all counsel)